IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1278

FRED DOYLE,

Respondent,

vs.

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILIP S. OLINGER
115 Fieldstone Dr.
Terrace Park, Ohio 45174
Tele. No. 513/831-5250
Attorney for Petitioner

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

CITATIONS

Cases: Page

Cases: Page

Cases: Page

Page

Statutes and Other Authorities:

Ohio Revised Code

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. ———

FRED DOYLE,

Respondent,

vs.

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, the Mt. Healthy City School District Board of Education, respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed the order of the United States District Court, Southern District of Ohio, reinstating the Respondent and awarding him compensatory damages but reversed the District Court as to the award of attorneys' fees.

OPINION OF THE COURTS BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit is attached hereto at App. pp. 18a-19a. The decision and opinion of the United States District Court for the Southern District is attached hereto at App. pp. 1a-17a. Neither opinion has been reported officially.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1975. The jurisdiction of this Court is evoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court has jurisdiction over this suit since the Mt. Healthy Board of Education is not a "person" within the meaning of 42 U.S.C. § 1983 and the plaintiff could not properly contemplate $10,000 as the amount in controversy for a suit under 28 U.S.C. § 1331?

2. Whether the Mt. Healthy City School District Board of Education is immune from suit under the sovereign immunity protection of the Eleventh Amendment of the United States Constitution?

3. Whether a Board of Education can be forced to give a continuing contract to a non-tenured teacher it considers too immature for the position, if one of the many factors on which the Board's decision is based is a telephone call to a local radio station, such call allegedly being within the First Amendment rights of the teacher?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I

Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Constitution, Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

FEDERAL STATUTES INVOLVED

28 U.S.C., Section 1331

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

42 U.S.C., Section 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities se-

cured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATUTES INVOLVED

STATEMENT OF THE CASE

This case originated in a suit filed by Fred Doyle, Respondent, against the Mt. Healthy Board of Education, its members individually, and the Superintendent, for reinstatement, compensatory and punitive damages under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343 (3) and 1343 (4). Doyle alleged that his limited teaching contract was not renewed in retaliation for the exercise of his constitutionally protected First Amendment rights; in particular he cited a telephone call to a local radio station criticizing the faculty dress code. Petitioners responded that Doyle's contract was not renewed as the result of a routine annual review of his performance as a teacher and not in retaliation for the exercise of his constitutionally protected rights.

The District Court ordered the Board to reinstate Doyle and to grant him a continuing contract. The Court awarded $5,158.00 as damages and an additional $6,343.16 in attorneys' fees. The Court further rendered judgment in favor of the individual Board members and the superintendent. Costs were to be assessed against the Board. In its findings the Court concluded that one impermissible reason — the telephone call to the radio station — played a substantial part in Doyle's non-renewal.

The Board appealed to the Court of Appeals for the Sixth Circuit and that Court affirmed the reinstatement and the compensatory damages but vacated the award of attorney fees.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. THE DISTRICT COURT DOES NOT HAVE JURISDICTION OF THIS MATTER.

a. A board of education is not a "person" under 42 U.S.C. § 1983 subject to money damages.

Section 1983 of Title 42 of the United States Code provides in pertinent part that "every person . . . who under color of state law . . . subjects or causes any citizen to be deprived of any civil rights . . . is liable for personal injuries."

Many jurisdictions have held that school boards are not persons under 42 U.S.C. § 1983. *See Singleton* v. *Vance County Board of Edn.*, 501 F.2d 429 (4th Cir. 1974); *Sterzing* v. *Fort Bend Indep. Sch. Dist.*, 496 F.2d 92 (5th Cir. 1974); *Brown* v. *Board of Education of City of Chicago*, 386 F.Supp. 110 (D.C. Ill. 1974); *Howell* v. *Winn Parish School Board*, 377 F.Supp. 816 (D.C. La. 1974); *Lopez* v. *Williams*, 372 F.Supp. 1279 (S.D. Ohio 1973); *Pelisek* v. *Trevor State Graded School Dist. No. 7, Salem Wis.*, 371 F.Supp. 1064 (E.D. Wis. 1974); *Vanderzanden* v. *Lrowell School District No. 71*, 369 F.Supp. 67 (Ore. 1974); and *Bichrest* v. *School Dist. of Philadelphia*, 346 F.Supp. 249 (E.D. Pa. 1972). *Courtney* v. *School Dist. No. 1, Lincoln County, Wyo.*, 371 F.Supp. 401, 403 (Wyo. 1974), and *Porcelli* v. *Titas*, 302 F.Supp. 726, 730 (N.J. 1969), both recognized the issue as a valid one to be de-

cided on the basis of the particular state law. The Ohio case — *Lopez* v. *Williams,* supra — held boards were not "persons" under Section 1983.

Cases arising under 42 U.S.C. § 1983 have distinguished between plaintiffs who ask for injunctive or other equitable relief and those seeking money damages. The latter suits have regularly been barred. *Monroe* v. *Pape,* 365 U.S. 167, 187-92, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). In *City of Kenosha* v. *Bruno,* 412 U.S. 507, 93 S.Ct. 222, 37 L.Ed.2d 109 (1973), the Court went further to state that Congress never intended courts to distinguish between the meaning of "persons" in Section 1983 depending on whether equitable or money remedies were sought; in neither case were government entities "persons" under Section 1983.

In *Lopez* v. *Williams,* 372 F.Supp. 1279 (S.D. Ohio, E.D. 1973), the court reached the same conclusion. *Lopez* was a Section 1983 suit brought by students against the school district for improper suspension. The court held that the "board of education was a political subdivision of the state and was therefore not a 'person' within the meaning of the federal civil rights statute, 42 U.S.C.A. § 1983. Accord: *Kramer* v. *Scioto Darby School District,* (U.S.D.C., S.D. Ohio, E.D.), Case No. 72-406, decision March 7, 1974; *Gilliam* v. *Lewis, et al.,* (U.S.D.C., S.D. Ohio, E.D.), Case No. C2-73-287, decision March 26, 1974. It follows that the Mt. Healthy Board of Education is not subject to suit under 42 U.S.C. § 1983.

b. Plaintiff has never had a claim that could be valued at $10,000 and therefore can not bring the suit under 28 U.S.C. § 1331.

In discussing the relationship between 42 U.S.C. § 1983, which grants immunity to municipal corporations, and 28

U.S.C. § 1331, which does not, the Second Circuit in *Brandt* v. *Town of Milton,* 43 LW 2388 (2/14/75), noted that the two were consistent in that § 1331 "preserves the municipality's immunity as to actions not involving this minimum sum." Consequently a close scrutiny of the amount in controversy is required before § 1331 jurisdiction attaches.

Doyle originally asked for reinstatement and $50,000 in punitive damages, court costs and attorney fees. Section 1331 provides that, in computing the amount in controversy, interest and costs are to be excluded. Under *Alyeska* v. *Wilderness Society,* 421 U.S. 240 (1975), the Court reasoned that attorneys' fees were like costs and would not be awarded absent statutory authority. On the basis of *Alyeska,* the Sixth Circuit held in the instant action that attorneys' fees would not be granted. In *Sincock* v. *Obaro,* 320 F.Supp. 1098 (D. Del. 1970), and *Cupples Co. Mfg.* v. *Farmers & Merchants State Bank,* 390 F.2d 184 (5th Cir. 1968), jurisdiction was refused for failure to have a sufficient amount in controversy after attorneys' fees were excluded.

The District Court in this case refused to award punitive damages, therefore plaintiff's only claim is for reinstatement. The value of the reinstatement claim, however, was never as much as $10,000. Doyle filed the suit July 13, 1971 yet at that time, according to his own testimony, he had already found other employment at Miami Trace. Consequently, the most he could anticipate in damages was the difference between his anticipated salary at Mt. Healthy and his actual wages at Miami Trace. This amount was calculated by the District Court to be a total of $5,158.00 for the *three years* it took for the case to come to judgment. When the suit was filed the difference in income anticipated for the coming year could not have been

more than $2,500. In sum, Doyle lacked the necessary $10,000 amount in controversy to bring the suit under 28 U.S.C. § 1331.

2. THE MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION IS IMMUNE FROM SUIT UNDER THE SOVEREIGN IMMUNITY PROTECTION OF THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

a. The Mt. Healthy Board of Education is a governmental entity entitled to Eleventh Amendment immunity from money damages.

The Eleventh Amendment of the United States Constitution provides that no state is subject to suit by a citizen of another state. The Supreme Court in *Hans* v. *Louisiana,* 134 U.S. 1, 10 S.Ct. 504 (1890), extended the doctrine of sovereign immunity to suits brought by citizens against their own state. Accord: *Scheuer* v. *Rhodes,* 94 S.Ct. 1683 (1974).

The question as to whether a state agency, such as the local board of education, is entitled to sovereign immunity is for the federal court to decide. However, that decision must be made in the context of state law. In *Gordenstein* v. *University of Delaware,* 381 F.Supp. 718, 720 (Del. 1974), the court described the relationship.

> "In determining whether an entity like the University is so closely related to the state as to share its Eleventh Amendment shield, it will ordinarily be the law of the state which defines the relationship. State law is the context in which the matter is to be determined, but it does not provide the controlling rule of law."

In Ohio, the legislative scheme assumes that the board of education is immune from money damages. Section 3313.203 of the Ohio Revised Code provides that boards may purchase liability insurance for school officers, employees and pupils, but boards are not given similar authority on their own behalf.

The legislative assumption is supported by Ohio case law. Courts have repeatedly held school boards not liable in tort actions. *Hall* v. *Board of Edn.,* 32 Ohio App. 2d 297 (1972); *Shaw* v. *Board of Edn.,* 17 Ohio Law Abs. 588 (1934); and *Board of Edn.* v. *Volk,* 72 Ohio St. 469 (1905). The rationale for immunity in these cases is that since the board is not authorized to raise taxes or sell property to pay a tort claim, "surely the law does not contemplate a right of action in the Plaintiff without any remedy to enforce it." *Volk, supra* at 480. This pocketbook test has been applied in federal jurisdictions with the same result. See *Jordan* v. *Gilligan,* 500 F.2d 701 (6th Cir. 1974); *Shehan* v. *Board of Trustees, Bloomsburg State College,* 501 F.2d 31 (3rd Cir.), and *Sincock* v. *Obana,* 320 F.Supp. 1098 (Del. 1970). See also *Thonen* v. *Jenkins,* 517 F.2d 3 (4th Cir. 1975).

When jurisdictions have permitted money damages against boards of education the same pocketbook test has been applied and the court has found that the school authority had the power and resources to pay the judgment. In *Gordenstein* v. *University of Delaware,* 381 F.Supp. 718 (1974), the court found that the University could raise the funds without further action by the state legislature, 381 F.Supp. at 721, and in *Fabrizio & Martin, Inc.* v. *Board of Edn. of Central School District No. 2,* 290 F.Supp. 945 (N.Y. 1968), state law specifically authorized the school district to pay judgments against the school district by levying taxes. 290 F.Supp. at 948. No

such finding was made in the instant case and there is no similar legislation in Ohio.

While some courts, for example *Harkless* v. *Sweeney Indep. School Dist.*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971), have held that claims for backpay by teachers are part of the equitable relief for reinstatement and, therefore, not damages, that has not been the rule in Ohio. The only school cases we have found in Ohio where immunity has not been a bar to suit have involved equitable damages *when the public treasury is not directly at issue. State ex rel. Board of Education* v. *Gibson*, 130 Ohio St. 318 (1935), involved the issue of whether the plaintiff board was immune from the statute of limitations and therefore in a position to collect tuition from non-residents even though the six year limitation had lapsed. *Akron Board of Education* v. *State Board of Education*, 490 F.2d 1285, *cert. den.* 417 U.S. 932 (6th Cir. 1974), was to restrain the transfer of land to an adjoining district. *Wayman* v. *Board of Education*, 5 Ohio St. 2d 248 (1966), dealt with whether a Board could be ordered to stop maintaining a nuisance (a parking lot). *Lopez* v. *Williams*, 372 F.Supp. 1279 (S.D. Ohio 1973), *aff'd sub nom. Goss* v. *Lopez*, 419 U.S. 565 (1975), was concerned with the constitutionality of the pupil's suspension; damages were not in contention. Doyle, unlike these plaintiffs, is claiming more than $10,000 in damages. Consequently, the facts in the present case do not merit overturning the Ohio precedent.

b. The Board's immunity has not been waived.

The Ohio Constitution provides in Article 1, Section 16, that suits may be brought against the State as provided by law. *Board of County Commissioners of Mahoning*

County v. *Rhodes*, 86 Ohio Law Abs. 390, 177 N.E.2d 557 (C. P. Franklin County, 1960), explained that Article 1, Section 16, was not self-executing. Absent enabling legislation, a suit may not be brought. The state legislature has not waived immunity for school boards. Sections 2743.01-2743.20 of the Ohio Revised Code, which waive state immunity and create a special court of claims for such suits, specifically exclude school districts from those governmental agencies to which the waiver applies.

Section 3313.17 of the Revised Code describes the powers of boards of education which include the capacity of "suing or being sued." The statute, however, has been construed very narrowly; boards have not been held liable in tort claims. *Shaw* v. *Bd. of Edn.*, supra; *Hall* v. *Bd. of Edn.*, supra; *Bd. of Edn.* v. *Volk*, supra.

Brown v. *Board of Edn.*, 20 Ohio St. 2d 68 (1969), construed Section 3313.17 of the Revised Code to permit suit in a state court only in conjunction with other powers conferred by statute, including that of "contracting and being contracted with." Since boards of education have specific powers to acquire real property, the board in *Brown* could be sued for adverse possession. In the present case, however, the action is in tort, and, therefore, the *Volk* analysis applies.[1]

Finally it should be noted that courts have repeatedly held that neither the Fourteenth Amendment nor the Civil Rights Act constitutes an effective waiver of sovereign immunity. See *Corbean* v. *Xenia City Board of Edn.*, 366 F.2d 480 (6th Cir. 1966); *Cuiska* v. *City of Mansfield*, 250 F.2d 700 (6th Cir. 1957); *Thatcher* v. *Board of Trustees of Ohio State University*, 58 Ohio Op. 45, 277 N.E.2d 818 (1971).

---

[1] Doyle could not bring the suit for breach of contract because he was non-tenured and his two year limited contract expired.

3. THE COURT BELOW ERRED IN CONCLUDING THAT THE BOARD REFUSED TO REINSTATE DOYLE FOR A CONSTITUTIONALLY IMPERMISSIBLE REASON.

a. The Board was not compelled to give any reasons for its decision to not renew Doyle's limited contract. In including the telephone call to the radio station as an illustration of Doyle's lack of tact, the Superintendent did not violate the teacher's First Amendment rights.

Fred Doyle had a limited contract with the Mt. Healthy Board. Section 3319.11, Ohio Revised Code, sets out the procedures for employment of teachers on a limited contract; should the board choose not to renew a limited contract, it is not required to give reasons for that decision. In *De Long* v. *Board of Education,* 37 Ohio App. 2d 69, 306 N.E.2d 774, *aff'd* 36 Ohio St. 2d 62 (1973), the court upheld the refusal of a school board to rehire a teacher without giving any reasons at all. Similarly, *Orr* v. *Trinter,* 29 Ohio Misc. 149, 444 F.2d 128 (1971), reversing 29 Ohio Misc. 62, 318 F.Supp. 1041 (1970), held that a public school teacher who has not attained tenure status and whose contract of employment is not renewed does not have a constitutional right to be told the reason for the non-renewal, nor to a hearing. See also *Conque* v. *Gausche,* 5th Cir. 3/14/75, *cert. denied* 10/14/75; *Board of Trustees of University of Tennessee* v. *Soni,* 513 F.2d 347 (6th Cir. 1975), *petition for cert. filed* 7/29/75; *Cusumano* v. *Ratchford,* 507 F.2d 980 (8th Cir. 1975); *Jeffries* v. *Turkey Run Consolidated School Dist.,* 492 F.2d 1 (7th Cir. 1974).

It is not disputed that the Board could have not renewed Doyle's contract without giving any reason. In fact, in its official communication, the Board did just that. Doyle's claim, however, stems from a letter written at

his request by the Superintendent. In that letter the Superintendent gave one reason for the non-renewal:

> "You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships."

The Superintendent offered two illustrations of Doyle's lack of tact: an obscene gesture he made to students and the phone call. The letter standing alone does not justify a conclusion that the Board based its decision substantially on the phone call because (1) the Superintendent wrote the letter and (2) in it expressly stated that the reason was Doyle's lack of tact. When the Board members were questioned individually as to the reasons for their decision they mentioned several incidents in which they thought Doyle had failed to show an ability to handle his responsibilities including an incident arising out of an altercation wtih a faculty member which resulted in the school having to be closed at noon, a problem occurring when Doyle confronted the cafeteria staff demanding a larger portion of spaghetti, a time when Doyle referred to some trouble-making boys as "sons of bitches," and his management of a cafeteria fighting incident, as well as the obscene gesture and phone call.

The constitutional test for the violation of a teacher's First Amendment rights was developed in *Pickering* v. *U.S.,* 391 U.S. 563 (1968), where the court considered the dismissal of a teacher who sent a letter to a local newspaper critical of the manner in which the Board had handled a bond issue. In holding in favor of the teacher, the Court noted the need to balance the First Amendment claims of the teacher against the need for orderly school administration. 391 U.S. at 568.

In applying this balancing test an Indiana court in *Knarr* v. *Board of School Trustees of Griffith, Indiana,* 317 F.Supp. 832 (1970), *aff'd* 452 F.2d 649 (7th Cir. 1972), refused to order the reinstatement of a teacher dismissed in part because of insubordination. One example of the teacher's improper behavior occurred when he was requested to discuss the school dress code and enlist student support. Instead he advised his class that they could defeat the administration by violating the code en masse because the school could not send everyone home. Other reasons included his disparaging comments about school administrators and other personnel. Plaintiff had alleged he was not given tenure because of his union activities but the court did not sustain such a finding.

The district court noted the broad discretion entrusted to the Board especially when considering whether to offer tenure and concluded in 317 F.Supp. at 836:

> "In denying Plaintiff tenure the school administrators were not acting with a desire to deprive Plaintiff of his freedoms of speech and association. The First Amendment freedoms of a teacher are not necessarily affected by the right of the school board to retain only those teachers who adequately discharge their teaching responsibilities and do not disrupt the efficient operation of the school. To the extent that this is a restriction of the freedom of a teacher, it is only incidental to the exercise of the school board's duty to maintain good schools."

Similarly, in *Parker* v. *Board of Edn. of Prince George County, Md.,* 237 F.Supp. 222, 229 (D.C. Md. 1965), *aff'd* 348 F.2d 464, *cert. denied* 382 U.S. 1030, *reh. den.* 383 U.S. 939, the court noted that the first amendment rights of a teacher are not absolute:

> "Where the abandonment of the abstract right of free speech results from government action taken for the protection of other substantial public rights, no constitutional deprivation will be found to exist." *American Communications Ass'n, CIO* v. *Douds,* 339 U.S. 382 (1950).

The state legislature has given the Mt. Healthy Board broad discretion to hire faculty. The Mt. Healthy Board members repeatedly testified that their decision was based on several incidents which conveyed to them the fact that Doyle had failed to demonstrate the maturity necessary to make a good teacher. In coming to that decision the Board acted within the lawful limits of its discretion. Doyle's behavior had disrupted the good operations of the school. Under *Pickering,* the Board is entitled to judgment in its favor.

b. The federal courts have not uniformly held that the presence of one constitutionally impermissible factor invalidates a school board's employment decision.

Although the Sixth Circuit Court of Appeals presumed and Respondent cited several cases as authority for the proposition that a non-renewal is constitutionally impermissible even if the teacher's exercise of First Amendment rights was only partially a factor in the non-renewal, no prior court has required a reinstatement unless the constitutionally impermissible reason played a *substantial* part in the non-renewal. *Gieringer* v. *Center School Dist. No. 58,* 477 F.2d 1164 (8th Cir. 1973); *Lusk* v. *Estes,* 361 F.Supp. 653 (N.D. Tex. 1973). In *Gray* v. *Union County Intermediate Education Dist.,* 520 F.2d 803 (9th Cir. 1975), *Sinard* v. *Board of Education,* 473 F.2d 988 (2d Cir. 1973), *Cook County Teachers Union Local 1600 AFT* v. *Boyd,* 456 F.2d 882 (7th Cir. 1971), *cert. den.* 409 U.S. 848, *reh. den.* 414 U.S. 883 (1973), and *Fluker* v. *Alabama State*

Board of Education, 441 F.2d 201 (5th Cir. 1971), courts upheld the Board's decision despite the teacher's claim.

Skehan v. *Bd. of Trustees of Bloomsburg State College,* 501 F.2d 31 (3d Cir. 1974), and *Roth* v. *Bd. of Regents,* 310 F.Supp. 972 (Wis. 1970), *aff'd* 446 F.2d 806 (7th Cir. 1971), *rev. and rem. on other grounds,* 408 U.S. 564, include dicta that non-renewal will not be affirmed if partially for impermissible reasons, but neither court holds that one impermissible factor contaminates the entire decision. In *Skehan,* the court remanded the case to determine inter alia whether the facts supported the teacher's claim (501 F.2d at 45), and in *Roth* the issue of whether the teacher was fired even in part for constitutionally protected activity was never decided because the court ruled instead on the procedural due process point (310 F. Supp. at 983).

Danse v. *Bates,* 369 F.Supp. 139 (N.D. Ky. 1973), clarifies the issue for there the court distinguished between three principals and one teacher who were demoted *solely* in retaliation for constitutionally protected activity (369 F.Supp. at 148) and two teachers who were not offered contracts at the same time and who had engaged in the same activity but for whom the court found other valid reasons for the Board's decision. Although the court reinstated four of the plaintiffs, the decision of the school board was affirmed in the case of the two teachers because the court found it justified by reasons unrelated to the First Amendment activities.

In *Callahan* v. *Superintendent of Edn. of Leske County, Miss.,* 505 F.2d 83, 513 F.2d 51 (5th Cir. 1975), *cert. denied* 11/4/75, the court upheld the non-renewal of a non-tenured superintendent whose employment was terminated because of community opposition, even though

some of the opposition was racially motivated by the superintendent's efforts to comply with desegregation orders. That case, like the present one, was tried on the basis of the First and Fourteenth Amendments and 42 USC § 1983. The constitutionally impermissible factor did not contaminate the Board's decision. The record in the instant case, as in *Callahan,* supplies ample acceptable reasons to warrant the Board's non-renewal decision; their decision should be upheld.

CONCLUSION

Jurisdiction in this case should never have been granted. Plaintiff did not have a claim of $10,000 to qualify under 28 U.S.C. § 1331 and jurisdiction under 42 U.S.C. § 1983 was not proper. The Supreme Court should consider this suit to resolve the inconsistency and confusion among the lower courts about the application of 42 U.S.C. § 1983 to local public school boards.

With the increasing involvement of courts in review of the decision making procedures of school boards the issue of Eleventh Amendment immunity for schools has taken on a new urgency. A uniform rule is badly needed so that the agencies committed to the education of our children can take the precautions necessary to protect their scarce dollars from the type of claim alleged herein. At the very least, the facts of this case do not merit overturning the Ohio rule of protection from monetary claims.

Even assuming jurisdiction and no immunity, assumptions we do not concede, the decision of the Court of Appeals should be reversed because the Mt. Healthy City School Board did not violate Fred Doyle's First Amendment rights. Under the law Doyle was not entitled to reasons for his dismissal. The reasons given in testimony

by the Board members indicate that their decision was not in retaliation for the telephone call to the radio station. Courts should not interfere in the daily operation of the schools absent a showing of a constitutional violation.

Respectfully submitted,

PHILIP S. OLINGER
Attorney for Appellant

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 8044

FRED DOYLE,
1965 Connecticut Avenue, Cincinnati, Ohio
Plaintiff,

v.

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION; REX RALPH, Individually and as Superintendent; WILLIAM C. LITTMEIER; WILLIAM M. MORRIS; MRS. MARCIA HAUPP and MRS. VIVIAN CLARK,
Defendants.

FINDINGS AND CONCLUSIONS

(Filed September 9, 1974)

Basically this is a civil rights case (42 U.S.C. § 1983) involving the failure to renew the contract of the plaintiff, a nontenured teacher, in the spring of 1971. It is claimed, and the claim appears well founded, that this Court has jurisdiction under 28 U.S.C. § 1331 (federal question) since it appears that the plaintiff's salary during the subsequent school year (1971-72), and entirely apart from tenure, would have amounted to more than $10,000.00.

The plaintiff graduated from Miami University in Oxford, Ohio, with a bachelor of science in education in 1966. He subsequently acquired an MA in 1968. His basic certification was as a professional high school teacher. In 1966 and at age 24, he was employed by the defendant Mt. Healthy Board of Education as a business teacher in the Mt. Healthy, Ohio school system and specifically in the high school.

The plaintiff taught in the high school until the summer of 1971. The years 1966-67, 1967-68, and 1968-69 involved one-year contracts. In 1969 he was tendered and accepted a two-year contract covering the years 1969-70 and 1970-71. Up to that point he had no tenure under Ohio law.

In 1969, at the end of the school year, he was "commended for an excellent rating as a teacher" by the Mt. Healthy Board, that action involving a merit raise.

In April of 1971 he was notified that the Mt. Healthy Board would not extend to him a contract for the coming year — 1971-72.

The decision of the Board with respect to that year, i.e., 1971-72, to tender or not to tender the plaintiff a further contract for another year or longer involved greater significance than the same decision in the previous year or years. The extension of a contract and his acceptance would have changed his status from a nontenured to a tenured teacher, such being the year of tenure acquisition under Ohio law.

This case was filed in July, 1971, against the Mt. Healthy Board as such; the five then (1971) members of that Board as such and individually (two are no longer on the Board); and the then Superintendent of the school system (who has since retired).

The plaintiff claims that the failure to renew and/or extend him tenure in 1971 was due to his exercise of his federal right of free speech and assembly and/or as a punishment therefor. The defendants claim that it was due to the plaintiff's "immaturity" and lack of "tact." It is noted that such factors are included as important in the standard Ohio forms used in evaluating student teaching.

The plaintiff seeks a reinstatement injunction with a back-pay award and attorney's fees.

During the plaintiff's first three school years as a teacher at Mt. Healthy his performance was, to say the least, quite satisfactory. Over the entire span of 1961-71, (a) there is no hint of criticism of his private or personal activities; (b) it is conceded that he was and is a good teacher in the sense that he knew his subject and had the ability to teach it effectively in the classroom; and (c) his school related extra-curricular activity was good. He, for instance, founded and conducted a new club activity called "Future Businessment of America Club" for the students, which all concerned compliment. He managed, from a faculty point of view, the school paper toward the end of his service, and turned its operation from red to black. He was prominently and favorably associated with Boy Scout and Explorer activities.

Events which brought about this case occurred basically in the 1969-71 period.

For some years prior to 1969 there had been an organization of the employees of the Mt. Healthy School System called the Mt. Healthy Education Association. Its members included what in an industrial field would have been described as both labor and management. In other words, active teachers were eligible as well as principals, assistant principals, school superintendents, etc. Its activities were

accented in the social field and in the general educational field. It had not overly concerned itself with the problems of teachers qua teachers vs. board, etc. qua employer. In 1969, the plaintiff was elected as president of this organization to serve for the 1969-70 term. Shortly after his election, the Education Association was reorganized. It adopted a new constitution which limited its membership to "full-time class room teachers, counsellors and librarians." More importantly, it devoted itself actively to the collective problems of the teachers vis-a-vis the superintendent and board, and, either late in 1969 or early in 1970, the Association as such (now named the Mt. Healthy Teachers Association) listed nine items of collective interest with respect to which its representatives desired to negotiate with the board as such. The items are the ones that might be expected and need not be listed. Typically the Association, under the leadership of the plaintiff, made some comparative studies of the salaries of surrounding school boards and studied further the records of the board with respect to the abilities of the board.

There were two general areas of procedural rubbing. The first might be described in this manner: The representatives of the Teachers Association wished to negotiate on all nine items and directly with the board and not through the superintendent. The board was willing to talk about six, but refused to talk about three as non-negotiable. Secondly, the board stood on the proposition that the negotiations had to be carried out by the superintendent directly. There existed a sort of impasse and the overall situation in early 1970 could be aptly described as tense. The three leaders of the Association included the plaintiff and two other teachers named Henn and Jewett. For instance, in early February, 1970, the board found it necessary to circulate to all teachers a reply to Doyle as

President made in response to the "numerous complaints against the board and administration" filed by the plaintiff and likewise circularized to the membership. On February 18 of that year a lengthy list or recommendations for amendments to the board policy was filed over the signature of the plaintiff. At this point the membership of the teachers association included approximately 250 out of 290 eligible.

On the 19th, again over Doyle's signature, there was delivered to the board a communication which in effect indicated that if the board did not begin good faith negotiations on the nine points by February 26, a strike vote would be considered.

This case from now on deals with a number of specific instances as relevant to the 1971 board decision not to renew.

We will adopt the names used during the trial, and the first would be called the "Hinkle" incident. On Friday, February 20, 1970, a fellow teacher named Hinkle came to the plaintiff's office. Hinkle protested some action or claim of the plaintiff and there was a verbal argument and eventually Hinkle slapped the plaintiff. The plaintiff went to the principal's office and the principal got Hinkle and brought him to his office and there was a discussion which resulted in Hinkle apologizing and the principal recommending to the plaintiff that he accept the apology and forget it. The plaintiff refused to "accept the apology." This in effect, at least in the context of this case, apparently meant that the plaintiff was not satisfied with that disposition and would want to appeal that disposition first to the superintendent and secondly, if not successful there, to the board. Subsequently the parties met with the superintendent, with the same result. At the start of the

school day on the following Monday, the 23rd, and at the opening of school, the participants (the plaintiff and Hinkle) were suspended and sent home. The result was a teachers walk-out at the high school, which for practical purposes shut down the school and sent home the pupils for that day. This was followed by a school board meeting and, as a result of all this, both suspensions were lifted with no prejudice to the record in respect of either participant; the board agreed to negotiate on all nine points; the board agreed to and did employ an attorney, and a specialist in such matters, to represent it in negotiations; negotiations on behalf of the board were to be carried out through the superintendent and this lawyer; the negotiations with the teachers were to be carried on by a team represented by Doyle and the other two teacher leaders heretofore named. Evidently this resulted eventually in the negotiation of mutually agreed upon solutions, although whatever solution was with respect to these demands is not a part of this record. The above is described in this record as the Hinkle incident and it is pointed to by the plaintiff as indicative of the real reason for his eventual disposition, and is pointed to by the defendants as evidencing a lack of "tact" — presumptively on the the theory that the recommendations of the higher authorities should have been accepted and would have been by a tactful person.

The remaining incidents which we will outline, without any particular dating, occurred at or about the same time and between that time and April of 1971 when the board determined not to renew, and the remaining incidents are relied on by the defendants as demonstrating the reason for the failure to renew. They are called: "gesture," "spaghetti," "radio," "SOB's," "direct dealing."

We will take the last one first. At one point during

the 1970 negotiations, the plaintiff prevailed on one of the board members to arrange for a meeting between the board as such, although informally, and the teachers association negotiating team. At the appointed time the board members walked into the appointed place and, instead of finding the team, were confronted by most of the membership of the association. Bearing in mind that one of the points of difference between the board and the association involved just this sort of thing, it was certainly a "tactless" thing to do and caused rather unfavorable reaction from, particularly, the board member who had negotiated the meeting. That particular board member happens to have a long record of AFL/CIO union membership in his ordinary full-time occupation.

Doyle objected to the amount of food, to-wit spaghetti (hence, the name), that had been served to him in the cafeteria. Technically, he had nothing to do supervisory-wise with any of the cafeteria help. The objection should have been lodged with the principal. However, it was not, and it led to a rather foolish argument during cafeteria hours between Doyle and the cafeteria help as a part of which Doyle found occasion to call the help "stupid." This resulted in a complaint by the kitchen authority to higher authority, a confession by Doyle that he was wrong and an appearance by him in the cafeteria for apology purposes, which resulted in another go-round.

The SOB incident: In connection with a disciplinary complaint, Doyle, in the presence of an assistant principal and three or four involved students, referred to the students as "sons of bitches." The appellation was heard by both the principal and the students involved. That, of course, does demonstrate, in any language, a lack of maturity and tact.

The "gesture" incident is described in this record in a file memorandum of the assistant principal copied below.

> "Earlier in the year Mr. Doyle and four girl students had a little problem over the procedure that Mr. Doyle follows in supervising the cafeteria during lunch time.
>
> "Because of the fact that the snack bar is needed fifth period for a study hall, Mr. Doyle tries to start getting things cleared up around 12:15. The girls felt this was unfair, and they began to make an obvious effort to slow things up as much as possible. After a couple days of this, Mr. Doyle confronted them on the situation and a heated verbal dispute ensued. During or at the end of the argument, Mr. Doyle gave the girls the two-fingered gesture and, of course, the girls responded with their own gesture.
>
> "Mr. Doyle came to me and told me of the problem and the names of the four girls involved. He told me that he knew he had over-reacted and all he wanted to do was talk to the girls in order to get things straightened out.
>
> "I called the girls to the office and Mr. Doyle did most of the talking. I only got involved when one girl began acting very rude and started getting disrespectful. During the course of the conversation, Mr. Doyle apologized for his actions and conveyed the reasons for the procedure followed in supervising the cafeteria.
>
> "Certainly, this type of action, provoked or unprovoked, is not the type of action that should be forthcoming from a mature adult.
>
> /s/ Walter Peters
> Walter Peters
> Assistant Principal"

The above needs this explanation. In what might be called the pig Latin of today, or perhaps more accurately high school sign language, the two-fingered gesture means

"bull —" and the one-fingered gesture means "screw you." This incident would undoubtedly give a school board pause in connection with the extension of a tenure contract.

The final incident is referred to as the "radio" incident. In February of 1971, the principal at the high school circulated to the various teachers a memorandum on teacher dress and appearance. It was a rather mild page and a half affair. The plaintiff promptly called it into a radio station in Cincinnati with which he had some established connection, which radio station promptly repeated it in substance on the air, with the comment that might be expected from a radio station specializing in acquiring young listeners. The memorandum had been prompted in the first place by the relationship between teachers' dress and public support in bond issues and that relationship is established in this record. The principal, who had an idea that publication was at Doyle's behest, called him on the carpet for it. Doyle apologized, agreeing with the principal's point that Doyle should have made some effort to give any criticism he had of it to the proper authority before going to any outside publication. Once again the incident is related to tact and maturity and all concerned must recognize that Doyle's contact with the radio station was a basic First Amendment right. On the other hand, there are tactful ways of exercising rights, or untactful ways; or, if one would prefer, there are mature ways and immature ways, and in any sort of organization immediate appeal to the outside is recognized as not desirable until its necessity is established.

Each year in the spring teachers are evaluated by the superintendent for purposes of the tender of then optional contracts in particular. The superintendent then reports to the board his recommendations. This was done in March of 1971 and specifically on March 17 the recom-

mendation with respect to the teachers involved were made to the board. With respect to Doyle the recommendation was that the board not enter into a new contract. The same recommendation was made with respect to four other high school teachers and five elementary school teachers, and the recommendation in each instance was adopted formally by the board. The superintendent and each of the four board members, who testified in this case, testified that his or her vote or recommendation was not based in any way on any activity of the plaintiff in the free speech or assemblage field. The board members, of course, testified, in addition, that they relied on the recommendation of the superintendent.

On April 2, 1971, the plaintiff was notified that the school would not extend to him a contract during the coming year. He asked for a statement of reasons and on the 15th he received a statement which cited "lack of tact" and gave as two examples the radio incident and the gesture incident.

It is important to note that while several other members of the teachers association, notably the ones above named, engaged in extensive activity along with the plaintiff with at least one of them being vulnerable from a non-tenure position, but nonetheless the other union-activity teachers were contract renewed. This is somewhat of an indication of a reason in the plaintiff's case. In addition, while it is apparent that the members of the association went up in arms in February of 1970 at the suspension, there appears to have been no reaction at all by the association to the failure to renew the contract in April of 1971. It is true that at the former time the plaintiff was president of the association, which he was not at the latter time; on the other hand, he was a member of the executive committee at the latter time.

Subsequently, the plaintiff secured employment at the Miami Trace Local School District in Washington Court House, Ohio, and for the three school years — 1971, 1972, and 1973 — has received wages of $29,127.00. If he had been employed through the same years with the Mt. Healthy Board, he would have received an aggregate of $34,285.00 — a monetary damage differential amounting to approximately $5,150.00 for the period involved.

The plaintiff's reasonable attorney's fees, including reasonable expenses, to date for the prosecution of this case amount to $6,343.16. Of that amount $2,539.98 has been paid to the plaintiff's counsel by a statewide teachers association of which the plaintiff is and has been a member.

The ultimate question of fact in this, as well as any case like this, is "whether the failure of the board to renew plaintiff's contract was because of his exercise of First Amendment rights." See *George* v. *Conneaut*, 472 F. 2d 132 (6th Cir. 1972). The plaintiff, of course, has the burden of proving just that by a preponderance. See *Fluker* v. *Alabama*, 441 F. 2d 201 (5th Cir. 1970).

Under Ohio law (Chapter 3313 Ohio Revised Code) the school board is a subdivision of the state and the board members are state officers, as is the school superintendent. Board members are selected at popular elections and for all practical purposes serve without pay. The superintendent is required to report on the teaching staff annually and is specifically required (3319.11) to recommend annually to the board in respect of the future of teachers not already tenured. A broad discretion in the employment of teachers (non-tenured) is devolved upon the Board and Superintendent. In fact, a teacher not under continuance contract (tenure) may be denied reemployment for *no* reason at all. Generally the situation lends itself to a "state officer" or "broad discretion" de-

scription — whether from the point of view of the board or superintendent.

No member of the Board acted with any malice. That is true of the Superintendent. In fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason — (see *James* v. *West Virginia,* 322 F. Supp. 217 (S.D. W. Va. 1971, aff. 448 F. 2d 785 (4th Cir. 1971)) independent of any First Amendment rights or exercise thereof, to not extend tenure. It is important to note that the new contract involved "tenure" and the record must be viewed with that in mind (i.e., prior recommendations and evaluation lose some force a/c not made in a similar situation). As we see it and find as a fact, the Superintendent and the Board were faced with a situation in which there were a number of moving causes, some permissible and some not permissible. The action based thereon, whatever its legal results, cannot be described as arbitrary or retaliatory or malicious or marked by bad faith.

Conclusions

1) If a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew — even in the face of other permissible grounds — the decision may not stand. See *Shehan* v. *Board,* — F. 2d — (3rd Cir. 1974) and cases therein cited; *Lusk* v. *Estes,* 361 F. Supp. 653 (Texas, 1973).

2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons — the one, the conversation with the radio station clearly protected by the First Amend-

ment. A court may not engage in any limitation of First Amendment rights based on "tact" — that is not to say that the "tactfulness" is irrelevant to other issues in this case.

3) The plaintiff is entitled to a reinstatement with back pay and, upon acceptance of reinstatement at the earliest permissible time, will be entitled to tenure on the same basis as if he had been employed by the defendant Board during the interim. There are some problems connected with this by virtue of the plaintiff's present contract and those problems will be left to the parties to work out in the first instance.

4) It seems settled enough that the remedy, if any, in addition to reinstatement and back pay (vs. the Board) is left to the Court to fashion. The only guideline seems to be "suitability" in the particular case. This is true whether this case be regarded as a 1983 one or a 1331.[1]

5) There should be an award against the Board as such for attorney's fees in the amount found reasonable — $6,343.16 — this for the reason that the public has an interest in having its state-related institutions act in compliance wih the Federal Constitution and, in a case such as this, plaintiff's counsel is in effect a private Attorney General. See *Stolberg* v. *Board,* 274 F. 2d 485 (2nd Cir. 1973); *Donahue* v. *Staunton,* 471 F. 2d 475, 482 (7th Cir. 1972); *Newman* v. *Piggie Park,* 390 U. S. 400 (1968). This should be without ref-

---

[1] The awarding of attorney's fees in § 1983 actions rests in the sound discretion of the district court judge. *Hill* v. *Franklin County Board of Education,* 390 F. 2d 583 (6th Cir. 1968).

When the statute is silent as to remedy, federal courts have a duty to fashion an effective remedy to carry out the purpose of the statute. *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964).

erence to any payments to plaintiff's counsel from private sources, and without deduction.

6) This is *not* a case for punitive damage. The Board acted here in a rather untrod field (several causes, one impermissible). This Court, while concluding as it has, recognizes a great deal of doubt and may be wrong. In such a situation it would be inequitable to award "punitive" damage.

7) The Board members, as individuals, are dismissed. There will be no damage award against them by this Court. The same is true of the Superintendent. Each was acting as a State officer in a field necessarily involving the broadest discretionary functions. As pointed out above, the State law contains *no* guidelines to govern a board or superintendent in solving the problem of whether tenure should or should not be tendered a given teacher. Any court should be careful in constituting itself a judge of "cause" in such a field — mainly because the expertise in that field rests with the school authorities. The law recognizes a "conditional privilege" in such matters and each member of the Board and the Superintendent enjoyed it. See *Safeguard* v. *Miller,* 472 F. 2d 732 (3rd Cir. 1973); *Lasher* v. *Shafer,* 460 F. 2d 343 (3rd Cir. 1972). This conditional privilege — or, if one would prefer, governmental immunity — protects from claims for attorney's fees, damages and punitive damages, at least in cases not involving flagrancy. This is far from a flagrant case.

8) Costs are to be assessed against the defendant Board.

9) This Court has not stated any conclusion on the possible Monroe-Kenosha problem in this case since it seems that the case is properly here as a § 1331

case, as well as a § 1983 one. Somewhat similarly, no conclusions relative to a possible Eleventh Amendment problem (see *Jordan* v. *Gilligan,* — F. 2d — (6th Cir. 1974)) are stated since the parties seem to concede that O.R.C. § 3313.17 (the Board of each District shall be a body politic and corporate, and, as such, capable of suing and being sued, etc.) provides the necessary waiver.

10) A decree and judgment consistent herewith may be prepared and settled and presented.

/s/ TIMOTHY S. HOGAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 8044

FRED DOYLE,
1965 Connecticut Avenue, Cincinnati, Ohio,
Plaintiff,

v.

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION, REX RALPH, Individually and as Superintendent, WILLIAM C. LITTMEIER; WILLIAM M. MORRIS; MRS. MARCIA HAUPP and MRS. VIVIAN CLARK,
Defendants.

JUDGMENT ENTRY

(Filed October 11, 1974)

This action came on for trial before the Court, the Honorable Timothy J. Hogan, (sic) United States District Judge, presiding, the issues having been duly tried to the Court and the Court having entered its Findings and Conclusions on September 9, 1974:

IT IS ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of Plaintiff against the Defendant, Mt. Healthy School Board of Education and it is ordered to reinstate Plaintiff to employment and to grant him a continuing contract as a teacher; that the Mt. Healhy City School District Board of Education pay to Plaintiff the

sum of $5,158.00 as damages and the additional sum of $6,343.16 as attorney fees.

Judgment is hereby and herewith rendered in favor of Defendants Rex Ralph, William C. Littmeier, Charles Muller, William M. Morris, Marcia Haupp and Vivian Clark, and against the Plaintiff as to any and all claims asserted by the Plaintiff against these said Defendants.

Costs are to be assessed against the Defendant, Mt. Healthy City School District Board of Education.

/s/ TIMOTHY S. HOGAN
U. S. District Judge

APPROVED:

/s/ JONAS B. KATZ
Jonas B. Katz and Anthony P. Sgambati II
Attorneys for Plaintiff

/s/ JOHN C. BURKHOLDER
John C. Burkholder
Attorney for Board of Education and Individual Board Members

/s/ JAMES L. O'CONNELL
James L. O'Connell
Attorney for Rex Ralph

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 75-1382

FRED DOYLE,
Plaintiff-Appellee,

v.

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,
Defendant-Appellant.

ORDER

(Filed December 10, 1975)

Before: WEICK, PECK, MILLER, Circuit Judges.

This appeal was perfected from a judgment of the district court ordering plaintiff-appellee reinstated in his position under a teaching employment contract and awarding compensatory damages and attorneys fees. Being fully advised in the premises, the Court concludes that substantial evidence in the record supports the finding of the district court to the effect that appellant's action in refusing to renew appellee's contract was motivated at least in part by his action in informing a local radio station of an "appropriate dress code" suggested for teachers, and that the district court did not err in concluding that the refusal to renew the contract was based on a constitutionally impermissible reason. It is further determined that the compensatory damages awarded to appellee were properly

computed but that the intervening decision in *Alyeska* v. *Wilderness Society*, —— U.S. ——, 95 S. Ct. 1612 (1975), renders the allowance of attorneys fees inappropriate. Accordingly,

IT IS ORDERED that to the extent the judgment of the district court ordered the reinstatement of the plaintiff-appellee and the award to him of compensatory damages, it be and hereby is affirmed; it is further ORDERED, however, that the award of attorneys fees be and it hereby is vacated and set aside.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

STATUTES

OHIO REVISED CODE

2743.01 Definitions

As used in Chapter 2743. of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

• • •

2743.02 Waiver of state's immunity; claims reduced by collateral recovery

(A) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.

(B) Awards against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery by the claimant.

• • •

3313.17 (4834). Corporate powers of the board.

The board of education of each school district shall be a body politic and corporate, and, as such, capable of

suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.

• • •

3313.203 Liability insurance for board of education members

The board of education of any school district may purchase from an insurance company licensed to do business in this state, a policy or policies of insurance insuring members of boards of education against liability on account of damages or injury to persons and property resulting from any act or omission of such member in his official capacity as a member of the board of education or resulting solely out of his membership thereon. Whenever the board considers it necessary to procure such insurance, it shall adopt a resolution setting forth the amount of the insurance to be purchased, the necessity thereof, and a statement of the estimated premium as quoted in writing by not less than two insurance companies if more than one company offers such insurance for sale to the board. Upon the adoption of such resolution, the board may purchase insurance from the insurance company submitting the lowest and best quotation. The premiums for such insurance shall be paid out of the general fund.

• • •

3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for

at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendaion has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent reemployment only a continuing contract may be entered into. If the board of education does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed reemployed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed reemployed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be reemployed, gives such teacher written notice of its intention not to reemploy him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at last three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed reemployed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be reemployed, gives such teacher written notice of its intention not to reemploy him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a

written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic reemployment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed reemployed under either a limited or continuing contract as the case may be under the provisions of this section. (129 v 1206. Eff. 10-17-61. 128 v 123)